No. 15-674

In The

Supreme Court of the United States

UNITED STATES, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* SAVE JOBS USA AND THE WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS IN SUPPORT OF RESPONDENTS

JOHN M. MIANO*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
*Counsel of Record

Attorney for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Amici submits this brief in support of their own interests as plaintiffs in ongoing federal court cases that share a key issue raised in the Brief for the Petitioners. *Amici* are plaintiffs in separate lawsuits against the United States Department of Homeland Security (DHS) that are progressing in the District of Columbia Circuit. Their cases involve the same issue at the heart of *Texas* v. *United States*: Do 8 U.S.C. §§ 1103(a) or 1324a(h)(3) confer unlimited authority on the Executive to define classes of aliens who may work in the United States? The answer to the question has widespread ramifications for our immigration system and directly affects the cases brought by *Amici*.

Amicus Save Jobs USA is a group of American computer professionals who worked at Southern California Edison until they were replaced by foreign guestworkers possessing H-1B visas. *Save Jobs USA* v. *U.S. Dep't of Homeland Security* is an Administrative Procedure Act (APA) challenge to DHS regulations granting work authorization to the spouses of certain H-1B guestworkers. No. 1:15-cv-00615 (D.D.C.). In

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), the parties received timely notice of, and consented to, *Amici Curiae*'s filing of this brief.

promulgating the 2015 regulations at issue in *Save Jobs USA*, DHS claimed its authority to grant work authorization to any alien of its choosing arose from 8 U.S.C. § 1324a(h)(3). Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284-312 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a). That case has been fully briefed on cross motions for summary judgment and submitted for decision to the district court. An appeal to the United States Court of Appeals for the D.C. Circuit is likely to be filed by the losing party.

Amicus the Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO (Washtech), is a union that represents American technology workers throughout the United States. In 2014 it brought an APA challenge to DHS regulations authorizing aliens to work on student visas after graduation when they are no longer students. *Wash. Alliance of Technology Workers* v. *U.S. Dep't of Homeland Security*, No. 1:14-cv-529 (D.D.C.) (*Washtech*). The district court held the regulations at issue were within DHS authority but vacated them because DHS failed to give notice and comment. *Washtech*, slip op. (D.D.C. Aug. 12, 2015). Washtech appealed the holding that the regulations were within DHS authority and the case is scheduled for oral argument before the United States Court of Appeals for the D.C. Circuit on May 4, 2016. *Wash. Alliance of Technology Workers* v. *U.S. Dep't of Homeland Security*, No. 15-5239 (D.C. Cir.). In briefing to the D.C. Circuit, DHS asserts that § 1324a(h)(3)

confers on the agency unlimited authority to allow aliens to work in the United States except where Congress explicitly prohibits it. Defendant-Appellee's Response Brief, *Washington Alliance of Technology Workers*, at 18 (D.C. Cir. Feb. 25, 2016).

DHS has since promulgated a new rule to replace the rule vacated by the district court that cites § 1324a(h)(3) as authority to allow nonstudents to work in the United States on student visas. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040-122 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a).

SUMMARY OF THE ARGUMENT

Amici address the granting of employment to aliens under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and the Respondents' standing because these are common issues with *Amici*'s own cases. The DAPA program grants aliens employment authorization to work in the United States. DAPA is not a lawful exercise of Executive power because there is no authority for granting such work permits.

Under the Constitution, the Congress has plenary power over immigration. Those powers may be delegated to the Executive for administration. The Executive makes the new claim that Congress has

delegated to it the power to authorize *any alien* to engage in employment as long as Congress has not explicitly prohibited it.

The Executive's source of this alleged authority is 8 U.S.C. §§ 1103(a) or 1324a(h)(3). The former defines the duties of the Secretary of Homeland Security and makes no mention of authority to grant employment. The latter is the definition (limited in scope to its own section) of the term *unauthorized alien* (*i.e.*, those aliens employers may not hire).

Congress could not have conferred on the Executive unlimited authority to grant aliens employment when it created § 1103(a) in the Immigration and Nationality Act of 1952 (INA) because the Act required all aliens entering the job market (with exceptions not relevant here) to not adversely affect American workers.

Subsection 1324a(h)(3) is merely a definitional provision that contains no authorization for anyone to do anything. Petitioners' interpretation of § 1324a(h)(3) as Congressional ratification of its claim of unlimited authority to grant work authorizations to aliens is nonsensical because it makes every explicit grant of authority to the Executive to allow classes of aliens to work surplusage.

The Petitioners' claim of unlimited authority to allow aliens to work creates an absurd situation where both the Legislature and Executive are legislating in the same area at cross-purposes. If the Court were to adopt the Petitioners' claim of unlimited authority,

the Executive can continue to erase statutory protections for American workers through regulation. Such an interpretation would conflict with past judicial precedent.

The States' injuries from DAPA should be obvious. The tortured, hairsplitting analyses to show otherwise makes a mockery of the standing requirements.

ARGUMENT

There are numerous hurdles the DAPA program must clear to be a lawful exercise of executive authority including the Take Care Clause; whether the blanket refusal to enforce the law is, in fact, discretion; and whether DAPA is merely an interpretive rule.[2] If DAPA survives those issues, there remains one more: the question of whether the Executive has the authority to grant work authorizations to DAPA participants.

DAPA is just one of several administrative actions in recent years made under the claim that the Executive has *unlimited authority* to grant work authorizations to aliens and that this claim is so new that it is being tested in the federal courts for the first time in several cases simultaneously. Unless

[2] *Amici* do not address these other issues because they are not common to their own cases.

there be statutory authority for granting work authorizations to deferred action recipients, DAPA does not survive a *Chevron* Step One analysis because of its grant of work authorizations to aliens. *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 52 (2011) (citing *Chevron, U.S.A.* v. *NRDC*, 467 U.S. 837, 842-43 (1984)).

I. DHS makes the striking claim that it has "dual authority" with Congress to authorize aliens to work in the United States.

The issue before the Fifth Circuit in the opinion on review here was whether the district court abused its discretion in granting the State Plaintiffs' motion for preliminary injunction. *Texas* v. *United States*, 809 F.3d 134, 146 (5th Cir. 2015). Petitioners seek to have the Court act as a trial court and decide the merits of the case before all the issues have even been argued below. Petition for Writ of Certiorari, at I. As such, the record before the Court from the present case does not demonstrate the full scope of the implications of the issues raised. Because their cases are further advanced, *Amici* have already seen and briefed the full range of the arguments Petitioners raise here in regard to employment. In addition, the cases of *Amici* illustrate the larger implications of the Court adopting the Petitioners' claim to unlimited authority to authorize employment to classes in parallel with Congress in less politically charged circumstances.

To the Court, the Petitioners have stated the scope of the Executive's employment authorization authority as, "Congress has [ ] accorded the Secretary discretion to decide whether, as an attribute of enforcement discretion, aliens may be lawfully employed . . . while their presence has been countenanced." Pet. Br. at 15. In fact, the Executive claim of authority under §§ 1103(a) or 1324a(h)(3) is much greater and not simply limited to instances of prosecutorial discretion. In *Wash. Alliance of Technology Workers*, the Executive states the scope of its authority is "Congress has separately delegated to the Secretary broad discretion to determine when nonimmigrants may work in the United States, unless Congress itself has expressly *prohibited* granting nonimmigrants work authorization." Defendant-Appellee's Response Brief, No. 15-5239, p. 18 (D.C. Cir. Feb. 25, 2015). *See also* Defendant's Memorandum in Support of its Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, *Save Jobs USA* v. *U.S. Dep't of Homeland Security*, No. 1:15-cv-00615, at 37 (D.D.C. Oct. 2, 2015) (stating DHS and Congress share "dual authority" to authorize aliens to work in the United States).

The breadth of the authority claimed is apparent from recent regulations authorizing classes of aliens to work and claiming § 1324a(h)(3) as a source of authority. 80 Fed. Reg. 10,284-312 (Feb. 25, 2015) (authorizing the spouses of H-1B guestworkers to be employed); 81 Fed. Reg. 13,040-122 (Mar. 11, 2016) (authorizing aliens to work on student visas after

graduation when they are no longer students); Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 80 Fed. Reg. 81,900-45 (proposed Dec. 31, 2015) (authorizing aliens with pending permanent residency petitions to engage in employment). These are legislative regulations authorizing employment to classes of aliens where Congress has not authorized such employment. *Id.* None of these work authorizations has anything to do with deferred action *Id.*

II. If Congress conferred dual authority on the Executive to grant employment authorizations, no one can definitively point to where that authority was created.

Petitioners claim Congress has conferred "sweeping authority" on the Executive that extends to unlimited authority to authorize employment to aliens. Pet. Br. at 63. Yet, there is no statute explicitly granting such authority. Adding to the confusion, there is no consensus where Congress *implicitly* granted such power. For example, the Brief of 186 Members of the U.S. House of Representatives and 39 Members of the U.S. Senate as *Amici Curiae* in Support of Petitioners (Members of Congress *Amici*) at 30 states that § 1324a(h)(3) itself, "specifically grants the Executive broad discretion to grant work authorization." In contrast, Petitioners argue "Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in

Section 1103(a)." Arguing this case in the Fifth Circuit, Petitioners claimed § 1324a(h)(3) was the source of authority to allow DAPA recipients to work and made no mention of § 1103(a) conferring such authority. Brief for the Appellants, No. 15-40238 at 8-9 (5th Cir. Apr. 30, 2015) and Reply Brief for Appellants at 21, 31 (May 18, 2015) (describing § 1324a as the "employment authorization statute").

The various administrative actions unilaterally granting employment to aliens have been just as conflicted in their source of authority. Following the argument of the Petitioners, 79 Fed. Reg. 26,887 (May 12, 2014) states that § 1324a(h)(3) "refers to the Secretary's authority to authorize employment of noncitizens in the United States." However, that proposed regulation never states the source of authority to which is being referred. Following the reasoning of the Members of Congress *Amici*, 80 Fed. Reg. 63,379 (Oct. 19, 2015) claims § 1324a(h)(3) is the source for "broad authority to determine which individuals are 'authorized' for employment in the United States." Staking out territory between those two, 80 Fed. Reg. 10,285 (Feb. 25, 2015) states that, "8 U.S.C. 1324a(h)(3)(B), recognizes the Secretary's authority to extend employment to noncitizens in the United States." If, in fact, Congress conferred such *sweeping authority* on the Executive, it is striking that there is no agreement where Congress actually did it. *See King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign ['a question of deep

economic and political significance'] to an agency, it surely would have done so expressly.").

III. If Congress provided the Executive dual authority to grant employment to classes of aliens, Congress hid that expansive grant within a mousehole.

"A primary purpose in restricting immigration is to preserve jobs for American workers; immigrant aliens are therefore admitted to work in this country only if they 'will not adversely affect the wages and working conditions of the workers in the United States similarly employed.'" *Sure-Tan* v. *NLRB*, 467 U.S. 883, 893 (1984) (quoting 8 U.S.C. § 1184(a)(14)). At the same time, "Congress [ ] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). One would then expect a grant to the Executive of dual authority with Congress to define classes of aliens who may work in the United States to have a clear statement somewhere; something like: *The Secretary may through regulation extend employment to aliens who* _____. Yet, no such provision exists. Lacking any such explicit authority, the courts are being asked to use their imagination to find this *sweeping authority* hidden in the mousehole of §§ 1103(a) and 1324a(h)(3).

A. Subsection 1103(a) could not have provided the Executive unfettered authority to grant alien employment because the Secretary of Labor was responsible for ensuring alien labor did not adversely affect American workers.

Subsection 1103(a) currently defines the powers and duties of the Secretary of Homeland Security. This provision was originally created in the INA, § 103, 66 Stat. 173-74. That provision (both as originally created and as it reads now) makes no mention of authorizing alien employment. *Id.* and § 1103(a) (2014). In fact, both the House and Senate reports on the Act directly contradict the claim there was such a grant of independent employment authority to the Executive anywhere within the 1952 Act. S. Rep. 82-1137 at 11 (Jan. 29, 1952) and H.R. Rep. 83-1361 at 51 (Feb. 14, 1952). Both reports state the INA excludes the admission of aliens to perform labor if the Secretary of Labor determines American workers are available or that such foreign workers will adversely affect American workers. *Id.*[3] Both reports also state the provision is applicable to "all aliens" except those determined to be needed in the United States and certain admissions for permanent residency. *Id.* This

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[3] The Immigration Act of 1965, changed this provision making such a certification by the Secretary of Labor a precondition for admitting foreign labor. Pub. L. No. 89-236, § 10, 79 Stat. 911, 917-18.

requirement that foreign labor may not be admitted if the Secretary of Labor determines it would have an adverse impact on American workers precludes the interpretation that § 1103(a) conferred on the Executive unfettered authority to authorize alien employment to "deferred action" recipients (as well as aliens working after graduation on student visas, spouses of H-1B guestworkers, and aliens with pending green card petitions).

B. Subsection 1324a(h)(3) is merely a definitional provision explicitly limited in scope to its section.

Section 1324a was created by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3445 (IRCA). It imposes civil and criminal penalties on employers who employ *unauthorized aliens* – *i.e.*, those not authorized to work in the United States. Subsection 1324a(h)(3) defines the term *unauthorized alien* solely for the purposes of its section. While central to their argument, Petitioners have not dared to quote the provision in full:

> **(3) Definition of unauthorized alien**
>
> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

§ 1324a(h)(3).[4] Clearly § 1324a(h)(3) is merely a definitional provision with its scope limited to a single section of the code that does not confer authority on anyone to do anything.

C. Petitioners' argument that § 1324a(h)(3) ratifies its claim of dual authority with Congress to define classes of aliens who may work in the United States is nonsensical.

The provisions of § 1324a in conjunction with the definition of the term *unauthorized alien* in § 1324a(h)(3) allow employers to hire without penalty three groups of aliens: (1) permanent residents; (2) those authorized to be employed by the INA (*e.g.*, H and L guestworkers); or (3) those authorized by the Attorney General (now the Secretary of Homeland Security).[5] The first two categories provide no difficulty in interpretation, but Petitioners raise the question,

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[4] Other definitions using similar language in regard to employment include, 8 U.S.C. § 1182(n)(5)(E) ("or by the Attorney General") and 8 U.S.C. § 1182(t)(4)(D) ("or by the Secretary of Homeland Security").

[5] In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most immigration-related functions from the Attorney General to the DHS Secretary. *See* 6 U.S.C. § 101 *et seq.*; *see also Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authority previously exercised by the Attorney General and Immigration and Naturalization Service (INS) "now reside" in the DHS Secretary and DHS).

why would Congress have included the phrase "or by the Attorney General" in the definition? Pet. Br. at 54

That question has a very simple answer. That phrase refers to situations where the INA authorizes the Secretary of Homeland Security to grant work permits to aliens who are not permanent residents and who do not have a visa status that permits work. IRCA itself contains seven specific grants of authority to the Attorney General to authorize classes of aliens without visas to engage in employment. § 201, 100 Stat. 3397, 3399 [two], § 301, 100 Stat. 3418, 3421 [two], 3428. The Senate report on IRCA illustrates the intended operation of § 1324a(h)(3), stating that such aliens shall "be considered to be authorized by the Attorney General to be so employed during the period of time indicated on such documentation." S. Rep. 99-132 at 43 (Aug. 28, 1985). Had Congress omitted the phrase "or by the Attorney General" from § 1324a(h)(3), aliens could possess work permits provided for by IRCA but they would be unemployable because those hiring them would be subject to the civil and criminal penalties contained in § 1324a.

Subsequent enactments confirmed that the phrase "or by the Attorney General" refers to specific circumstances where the Executive branch has been granted authority to authorize employment. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, granted discretion to the Executive to extend employment authorization to asylum applicants through regulation. Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693. The Violence Against

Women and Department of Justice Reauthorization Act of 2005, granted DHS discretion to provide employment authorization to Violence Against Women Act petitioners. Pub. L. No. 109-162, § 814, 119 Stat. 2960, 3059 (2006). The same section also provided that DHS "may authorize" battered spouses "to engage in employment." *Id.* The Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, § 908, 112 Stat. 2681-538, provided that the Attorney General, "may authorize" employment to certain Haitian nationals. In the absence of the "or by the Attorney General" language in § 1324a(h)(3), Congress would have authorized the Executive to grant work permits but such aliens would be unemployable because of the penalties in § 1324a. Worse yet, under the Petitioners' interpretation, all discretionary authority for the Executive to grant work permits to aliens are all meaningless surplusage because, as the Petitioners' argument goes, the Executive already had discretionary authority to authorize employment to any alien under §§ 1103 and 1324a(h)(3).

Petitioners assert, however, that the only logical way to interpret the phrase "or by the Attorney General" in § 1324a(h)(3) is that Congress was aware of and approved of the Executive authorizing employment of aliens through regulation. Pet. Br. at 54 (quoting 52 Fed. Reg. 46,093). That argument is nonsensical because, as just shown, there is another, more logical way to interpret the phrase "or by the Attorney General" in § 1324a(h)(3). Petitioners'

argument is also illogical because its interpretation cannot explain why Congress included provisions in IRCA granting the Secretary of Homeland Security authority to provide certain aliens with work permits and cannot explain subsequent similar grants of authority – all of which become surplusage under Petitioners' interpretation. This is an interpretation that cannot stand because, "no words are to be treated as surplusage or as repetition." *Platt* v. *Union P. R.*, 99 U.S. 48, 59 (1879).

D. The claim that § 1324a(h)(3) authorizes the Executive to define classes of aliens eligible for employment is largely a new invention.

Assuming Congress actually did confer on the Executive dual authority to define classes of aliens that may work in the United States in 1952 by creating § 1103(a) and ratified that expansive power in 1985 by creating § 1324a(h)(3), how come no one knew about this until recently? Why is there no case law holding that the Executive has such power?

The answer to those questions is simple as well: this claim of power is largely a very recent invention of DHS. The Petitioners note that the INS used § 1324a(h)(3) as justification for rejecting a petition for rulemaking made before the enactment of IRCA. Pet. Br. at 54 (citing 51 Fed. Reg. 39,385-86 (Oct. 28, 1986) and 52 Fed. Reg. 46,093 (Dec. 4, 1987)). The filers of the rulemaking petition never followed up on

that rejection with a court challenge, so the INS's interpretation was never subjected to judicial review. After that rejection, § 1324a(h)(3) remained dormant as a source of Executive authority for over a quarter century.

The next time the Executive cited § 1324a(h)(3) for the proposition that it conferred authority to authorize aliens to work was in the DHS regulatory agenda, 78 Fed. Reg. 1,317 (Jan. 8, 2013), describing the intent to create a regulation authorizing employment for spouses of H-1B guestworkers that is the subject of *Amici* Save Jobs USA's litigation in the D.C. District. 80 Fed. Reg. 10,284 (Feb. 25, 2015). Subsequently, DHS has published an additional rule and a proposed rule citing § 1324a(h)(3) as a source of authority for defining classes of aliens who may work in the U.S. 81 Fed. Reg. 13,040-122 (Mar. 11, 2016) and 80 Fed. Reg. 81,900-45 (Proposed Dec. 31, 2015).

The former is a replacement for the regulation vacated in *Amici* Washington Alliance of Technology Workers' litigation. That rulemaking provides another example of the newness of this claim of authority. The new regulation cites § 1324a(h)(3) for the proposition that it confers on DHS, "broad authority to determine which individuals are 'authorized' for employment in the United States." 81 Fed. Reg. 13,044. The vacated regulation (also authorizing the same work program allowing non-student graduates to work for extended periods of time on student visas) made no mention of § 1324a(h)(3). Extending Period of Optional Practical Training by 17-Months for F-1

nonimmigrant Students with STEM (Science, Technology, Engineering, and Mathematics) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944-56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214 and 274a). The recent DAPA and DACA program have no comparable paper trail because they were created without using notice-and-comment rulemaking.

The Executive branch's claim of dual authority with Congress to authorize classes of aliens to work in the United States has come out of nowhere. Unless one had been aware of the denial of a rulemaking petition made over a quarter-century ago, one would have had no notice whatsoever that DHS claimed such broad reaching power to authorize classes of aliens to work until the recent flurry of administrative actions authorizing alien employment. That is the reason for the equally sudden appearance of lawsuits challenging the authority of DHS to grant employment to different classes of aliens.

IV. There is no connection between enforcement discretion and work authorizations.

Through the sleight of hand of cut and paste, Petitioners argue that work authorizations under DAPA flow naturally from enforcement discretion for those unlawfully present in the United States, stating:

> The connection between enforcement discretion and work authorization is close and

> natural: Exercising discretion means that aliens will live in the United States, and "in ordinary cases [people] cannot live where they cannot work."

Pet. Br. at 40 (quoting *Truax* v. *Raich*, 239 U.S. 33, 42 (1915)). However, the full quote from *Truax* reads:

> The assertion of an authority to deny to aliens the opportunity of earning a livelihood *when lawfully admitted to the State* would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.

239 U.S. at 42 (emphasis added). *Truax* has nothing whatsoever to do with deferred action or discretion for those unlawfully present in the United States.

In addition, the claim of authority to grant work authorizations to those unlawfully present when enforcement is deferred is incongruous with Congress's finding for IRCA that the "adverse impact of illegal aliens was substantial and warranted legislation both to protect U.S. labor and the economy, and to assure the orderly entry of immigrants into this country" and that "the most reasonable approach to this problem is to make unlawful the 'knowing' employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor." H.R. Rep. 99-682 at 52 (July 16, 1986) (quoting H.R. Rep. 94-506 at 3). Through DAPA, the Executive seeks to provide the

very same incentive of employment that Congress sought to eliminate in IRCA. *See* § 1324a.

Petitioners' *Truax* example also illustrates the utter inconsistency of their entire argument in support of DAPA. On one hand Petitioners state that DAPA "confers no substantive right" and "does not confer any form of legal status in this country." Pet. Br. at 66. Yet, on the other hand, Petitioners state, "An alien with deferred action is considered 'lawfully present' for these purposes ['Social Security retirement and disability, Medicare, and railroad-worker programs']." Pet. Br. at 8. Surely, making aliens "lawfully present" confers a "legal status" in this country and making such aliens eligible for Social Security, Medicare, and railroad programs (as well as drivers' licenses, workers' compensation, and employment insurance) confers on such aliens "substantive right[s]," the full scope of which are not yet known (and are likely to generate much litigation if DAPA be allowed to proceed) creating injury to the States. Pet Br. at 8 and 66.

V. Adopting the Petitioners' claim of authority to grant work permits to any alien will allow the Executive to wipe out all protections for American workers in the immigration system and reverse past judicial interpretation.

Congress has set up an elaborate system of visas under the INA, defining which categories of aliens may work, *e.g.*, 8 U.S.C. § 1101(a)(15), incorporating

protections for American workers, *e.g.*, 8 U.S.C. §§ 1182(n), 1184(g). If the Executive branch possesses dual authority with Congress to independently authorize classes of aliens to be employed, the Executive can wipe out any protections for American workers Congress enacts by simply defining a new class of aliens that may work through regulation.

The Court should take note of the facts of *Wash. Alliance of Technology Workers*, to better understand the consequences for American workers, including *Amici*, should this Court adopt the government's overbroad claim of authority to grant alien employment. The H-1B visa program is routinely used to replace American workers in technology fields with lower paid foreign workers. *E.g.*, Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, New York Times, June 3, 2015. To protect American workers, Congress has put in place limits on the number of H-1B visas, which in turn limit the number of Americans that can be replaced by such workers. § 1184(g).

In 2007 Microsoft concocted a scheme to get around the H-1B quotas by using student visas instead. *Wash. Alliance of Technology Workers v. United States Dep't of Homeland Security*, No. 1:14-cv-529 D.D.C.) (Administrative Record (A.R.) at 120-23). By allowing aliens to work on student visas for 29 months after graduation, such labor could be used in place of an H-1B visa. *Id.* Microsoft presented its scheme to the DHS secretary at a dinner party. *Id.* From there DHS worked secretly with industry

lobbyists to prepare regulations implementing Microsoft's scheme. A.R. 124-27, 130-34. The first notice to the public that such regulations were even being considered is when DHS put them in place, as a *fait accompli*, without notice and comment. 73 Fed. Reg. 18,944-56 (Apr. 8, 2008).

DHS's predecessor, the INS, had more than once attempted to subvert Congress's intricate statutory system of protections for American workers in the same manner. *See, e.g., Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985) and *Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985) (declaring unlawful INS practice of allowing foreign bricklayers to work in the United States on B (visitor) visas rather than the appropriate H-2 (guest worker) visa); *Int'l Longshoremen's & Warehousemen's Union* v. *Meese*, 891 F.2d 1374 (9th Cir. 1989) (declaring unlawful INS practice of admitting foreign crane operators to work in the United States on D (crewmen) visas rather than the appropriate H visa). Here, Petitioners seek to have the Court endorse this very same kind of Executive overreach that the courts have rebuffed in the past. *Id.*

VI. If the Court holds the Executive has the authority to define classes of aliens who may work in the United States the country no longer has a viable immigration system.

The Court has observed, "From the existence of two sovereigns follows the possibility that laws can be

in conflict or at cross-purposes." *Arizona* v. *United States*, 132 S. Ct. 2492, 2500 (2012). "Under basic separation-of-powers principles, it is for the Congress to enact the laws, including 'all Laws which shall be necessary and proper for carrying into Execution' the powers of the Federal Government." *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2087 (2015) (quoting Art. I, § 8, cl. 18). History shows what happens when there is more than one chef in the kitchen. During the Second Punic War in 216 B.C., the Roman army facing Hannibal had an absurd command structure. The two consuls, L. Æmilius Paullus and C. Terentius Varro, shared command of the army with each being in charge on alternate days. Livy, History of Rome, Book XXII. The two consuls would countermand each other's orders when it became his day to lead. *Id.* On one of his leadership days, Varro took it upon himself to engage Hannibal in battle without consulting Paullus – and the Roman army was slaughtered at Cannæ. *Id.*

Petitioners urge the Court to establish an immigration system that is as headless and dysfunctional as the Roman Army at Cannæ. Pet. Br. at 63. In the Petitioners' proposed system, Congress creates protections for American workers by limiting the number of guestworkers. § 1184(g). Then the Executive undermines those statutory provisions by promulgating regulations authorizing aliens to work on student visas instead. 73 Fed. Reg. 18,944-56 (Apr. 8, 2008). Congress debates the wisdom of allowing spouses of H-1B guestworkers to work as well. 4147 Cong. Rec.

H5357 (daily ed. Sept. 5, 2001); I-Squared Act, § 102, S. 153, 114th Congress (Jan. 13, 2015). When Congress decides not to allow such spouses to work, the Executive steps in and does the same through regulation. 80 Fed. Reg. 10,284 (Feb. 25, 2015). Congress addresses lengthy employment-based green card adjudications by allowing such aliens to extend their H-1B status. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 106, 114 Stat. 1251, 1253-55. Then the Executive decided what Congress did was not good enough and publishes regulations to grant such aliens work permits of its own. 80 Fed. Reg. 81,900-45 (proposed Dec. 31, 2015). Through its conflicting, unilateral action, the Executive is transforming national alien employment policy into Dr. Doolittle's pushmi-pullyu. Hugh Lofting, *The Story of Doctor Doolittle*, at 82 (1920). The Court should not countenance such a dysfunctional, two-headed view of government as put forth by the Petitioners. It is the Congress, "which has plenary power over immigration matters." *Sale* v. *Haitian Ctrs. Council*, 509 U.S. 155, 201 (1993).

VII. The States' standing to challenge DAPA should be obvious.

The Court has rejected the notion that the injury required for standing be significant. *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 61 n.10 (1976) (Stewart, J., concurring). Slight injuries have routinely conferred standing. *See, e.g.*, *Salazar* v. *Buono*, 559 U.S. 700, 711 (2010) ("offense at the presence of a

religious symbol on federal land"); *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (standing based on an injury that was "small in magnitude"); *Pub. Interest Research Group* v. *Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 ("The size of the injury is not germane to standing analysis."). In this case the injuries to the Respondents should be obvious. Under DAPA, the States suffer direct injuries to their unemployment and workers' compensation systems as a result of being forced to subsidize aliens allowed to enter the job market. The entry of such aliens into these programs inflicts a cost on the states and at the very least requires the states to take actions that alone should be sufficient injury-in-fact for standing. These are plain vanilla injuries that do not even require invoking the relaxed standard put forth in *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007).

Deferred action also subjects the states to lawsuits for claims of benefits, the full scope of which has yet to be determined. In the recently filed case of *Georgia Latino Alliance for Human Rights* v. *Alford*, No. 1:16-mi-99999-UNA (N.D. Ga. Mar. 9, 2016), the plaintiffs allege that the Respondent State of Georgia must provide aliens receiving deferred action in-state college tuition. In *Ariz. DREAM Act Coal.* v. *Brewer*, 757 F.3d 1053, 1069 (9th Cir. Ariz. 2014), the Ninth Circuit held that the district court erred by denying the plaintiffs' motion for a preliminary injunction against the State of Arizona's policy of withholding

drivers' licenses to Deferred Action for Childhood Arrivals (DACA) program participants. These cases demonstrate that the DAPA program, at the very least, exposes the States to legal claims for benefits from DAPA recipients, as in the case of *Ariz. DREAM Act Coal.*, exposing them to court mandated costs.

A. Texas's injury of providing drivers' licenses is not self-inflicted because it tracks federal law.

The Fifth Circuit addressed only one of the many injury theories that should confer standing on Respondents: the requirement to provide drivers' licenses to DAPA recipients. *Texas*, 809 F.3d at 150-62.[6] Petitioners argue to the Court that the injury of having to provide drivers' licenses to DAPA recipients is self-inflicted because they have linked their drivers' license eligibility to federal law. Pet. Br. at 27. Yet in the United States' Brief as *Amicus Curiae* in Opposition to Rehearing en Banc, *Ariz. DREAM Act Coal.* v. *Brewer*, No. 13-16248 at 12 (9th Cir. Sept. 30, 2014), the Executive argued to the court that Arizona's refusal to grant DACA recipients drivers' licenses was unlawful *because it was not linked to Federal Law*. By

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[6] The Fifth Circuit's standing analysis for this one injury spans thirteen reporter pages. The States explicitly pled a number of other injuries, including having to provide professional licenses and unemployment insurance. Amended Complaint, *Texas v. United States*, No. 1:14-cv-254, ¶¶ 61-69 (S.D. Tex. Dec. 9, 2014).

taking both sides of this question in different cases, the Executive puts the Respondents in a Kobayashi Maru no-win scenario.[7]

B. The states do not present a generalized grievance because they have pled a cause of action explicitly authorized by Congress.

The Petitioners categorize the States' complaint as a generalized grievance. Pet. Br. at 21-22.[8] The prohibition upon the courts entertaining generalized grievances is a judicially self-imposed prudential restriction. *Devlin* v. *Scardelletti*, 536 U.S. 1, 7 (2002) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). However, "Congress may grant an express right of action to persons who otherwise would be barred by

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[7] *See Star Trek II: The Wrath of Khan* (Paramount 1982). In granting the preliminary injunction, the district court's opinion addressed this very same no-win situation at length. *Texas v. United States*, 86 F. Supp. 3d 591, 619-22 (S.D. Tex. 2015).

[8] Petitioners suggest that granting standing to the States would unleash court challenges against immigration policy. Pet. Br. at 19. There are two sides to that coin. Allowing DHS to unilaterally grant 'lawful presence' to persons who are otherwise unlawfully in the United States, Pet. Br. at 8, subjects the States to lawsuits from such aliens claiming benefits. *E.g.*, *Ariz. DREAM Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. Ariz. 2014) (Plaintiffs alleged deferred action recipients are entitled to drivers' licenses.); *Georgia Latino Alliance for Human Rights* v. *Alford*, No. 1:16-mi-99999-UNA (N.D. Ga.) (Plaintiffs alleged deferred action recipients are entitled to in-state college tuition).

prudential standing rules." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Congress has explicitly created such an express cause of action under the APA that should negate prudential considerations, including generalized grievances. 5 U.S.C. § 706.

Even if Congress did not have the power to negate prudential standing considerations, the very fact that the States' complaint alleges "a specific executive action (DAPA)" is unlawful under the APA invalidates the generalized grievance argument against their standing. A generalized grievance has two parts: (1) it must be widely shared; and (2) it must be insufficiently concrete. *FEC* v. *Akins*, 524 U.S. 11, 24-25 (1998). The States' injuries from DAPA may be widely shared (satisfying the first prong of the test) but the States present a simple, concrete issue: *is a specific agency action* (the DAPA directive) *unlawful under the APA*? This is nothing like the nebulous claims the Court has found to be generalized grievances, such as "to require that the Government be administered according to law and that the public moneys be not wasted." *Lance* v. *Coffman*, 549 U.S. 437, 440 (2007) (quoting *Fairchild* v. *Hughes*, 258 U.S. 126, 129-30 (1922)).

C. An action that creates incidental effects that are likely to cause harm has routinely been an injury-in-fact that confers standing on parties.

Petitioners argue that the injuries claimed by the States (that is, providing benefits to DAPA recipients)

are incidental to allowing aliens into the job market (making them eligible for government services) and that such incidental effects cannot be an injury-in-fact to serve as the basis for standing. Pet. Br. at 20-24. In fact, such incidental effects routinely confer standing on plaintiffs.

Since *Ass'n of Data Processing Serv. Orgs.* v. *Camp*, the Court has recognized the competitor standing doctrine whereby a party has standing to challenge an agency action that allows competitors into its market. 397 U.S. 150, 152-53 (1970). For competitor standing, Plaintiffs have not had to prove specific incidental effects (*e.g.*, lost sales, lost customers, and reduced prices) to establish competitive injury, only that the action allows additional competitors into the market. *E.g.*, *NCUA* v. *First Nat'l Bank & Trust*, 522 U.S. 479, 488 n.4 (1998) (stating it was "not disputed that respondents have suffered an injury-in-fact" when the agency action allowed a single competitor into its market). The specific harms flowing from additional competitors are presumed through the "application of basic economic logic." *United Transp. Union* v. *ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989).

In an artful pleading, one of the injuries-in-fact the States could have alleged is that DAPA *allows* otherwise unauthorized aliens into the States' job markets. *Cf.*, *La. Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (stating a party suffers an injury-in-fact when agencies "allow increased competition"). Analogous to competitor standing, the

harms of providing drivers' licenses, workers compensation, and employment here flow directly from the injury-in-fact caused by Petitioners allowing such aliens into the job market. *See Clinton* v. *City of New York*, 524 U.S. 417, 433 (1998) (stating any petitioner who is likely to suffer economic injury as a result of government action satisfies the injury-in-fact requirement). It defies economic (or any other type of) logic to reach the conclusion that the States and their citizens do not suffer any kind of injury sufficient to establish standing when the Executive branch adds aliens to the job market through rulemaking.

D. The Federal courts serve the key role as arbiter between the Executive and Legislature under the Administrative Procedure Act.

Under the Administrative Procedure Act, Congress delegates authority to executive agencies and the courts are the designated arbiters of the scope of that authority. 5 U.S.C. § 706. Under the APA the courts have an *expansive* role in balancing the powers of the Executive and Legislative branches. Standing should not be used as a means to "immunize government officials from challenges to allegedly *ultra vires* conduct." *Arpaio* v. *Obama*, 797 F.3d 11, 29 (D.C. Cir. 2015) (Brown, J., concurring).

The Petitioners argue that this issue should be resolved through "the political process, 'informed by searching, thoughtful, rational civic discourse.'" Pet.

Br. at 33 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012)). How is that discourse supposed to take place when the Executive unilaterally acts on a grand scale, relying on a questionable (if not dubious) claim of statutory authority, without so much as providing public notice-and-comment? Even Congress has little power of redress on its own. While it takes a majority vote to confer authority on the Executive, it effectively takes a two-thirds majority vote in Congress to reclaim authority because of the presidential veto power. U.S. Const. art. I, § 7; *see also Raines v. Byrd*, 521 U.S. 811, 812-29 (1997) (stating members of Congress did not have standing over claims of injury to institutional authority). As Petitioners point out, the programs at issue were implemented through agency action *after Congress rejected similar legislation*. Pet. Br. at 59. Under the APA, it is the job of the Federal courts to resolve the very type of conflict the States present. 5 U.S.C. § 706.

Petitioners cannot show any explicit statutory authority granting them the power to authorize alien employment. Instead, the Petitioners' claim of authority is that they have been granting work authorizations to aliens for a long time. Pet. Br. at 50-55. The Court should take notice that such claims had never (until recently) been subjected to judicial review because, up to now, the courts have brushed aside challenges to similar actions by inventing novel, inconsistent standing rules out of thin air. *E.g.*, *Fed'n for Am. Immigration Reform* v. *Reno*, 93 F.3d 897, 903-04 (D.C. Cir. 1996), *cert. denied*, 521 U.S. 1119;

see also id. at 904-05 (Rogers, J., dissenting) (stating the majority "ignores express instruction from the Supreme Court and fashions a new standard without any previous support"). Sadly, the current approach to standing, "too often stifles constitutional challenges, ultimately elevating the courts' convenience over constitutional efficacy and the needs of our citizenry." *Arpaio*, 797 F.3d at 32. The purpose of standing should be to ensure that a plaintiff has a tangible interest in the matter and that standing should not be a vehicle for hairsplitting pettifoggery for arguing that no one can challenge an Executive rulemaking action – as Petitioners urge here and is too often the norm in APA cases. *See* Pet. Br. at 31 (Petitioners urge the court to protect administrative actions on the basis of standing rather than the merits).[9]

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[9] *Amici* fail to see how restricting standing is a better means for limiting challenges under the APA than having clear precedent on the merits for the scope of executive authority. The current standing chaos results in multiple cases being brought on the same merits issues. *Compare Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985) (appeal of dismissal on standing) *with Int'l Union of Bricklayers & Allied Craftsmen* v. *Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985) (the same plaintiffs had standing to challenge the same administrative action in a different court); *compare Programmers Guild* v. *Chertoff*, 338 Fed. Appx. 239 (3d Cir. 2009), *cert. denied*, 559 U.S. 1067 (holding American workers did not have standing to challenge DHS regulations) *with Wash. Alliance of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014) (holding American workers had standing to challenge the very same regulations).

CONCLUSION

The Court should affirm the decision of the Fifth Circuit by holding that the Congress, possessing plenary authority over immigration, has the exclusive authority to define classes of aliens eligible to be employed in the United States.

Respectfully submitted,

JOHN M. MIANO*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
**Counsel of Record*

Attorney for Amici Curiae